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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID GONZALEZ,

Defendant and Appellant.

D074726

(Super. Ct. No. RIF1404885)

APPEAL from a judgment of the Superior Court of Riverside County, Thomas M. Kelly, Judge. Remanded for resentencing.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Craig H. Russell, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted David Gonzalez of first-degree murder and found that Gonzalez personally and intentionally discharged a firearm in the course of committing the murder, pursuant to Penal Code section 12022.53, subdivision (d).¹ The trial court made an additional true finding, pursuant to section 677, that Gonzalez had a prior serious felony conviction and a prior strike. The trial court sentenced Gonzalez to prison for an indeterminate term of 75 years to life and a consecutive determinate term of five years. Gonzalez appealed and this court previously affirmed the conviction but remanded the case to the trial court for resentencing based on an amendment to section 12022.53, subdivision (h) allowing the trial court to exercise its discretion to strike the firearm enhancement.

Gonzalez now asks this court to remand the case for resentencing once again based on a subsequent amendment to section 677. The People concede the case should be remanded for this purpose, and we agree. In supplemental briefing, and in reliance on the recent opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Gonzalez also asserts the trial court violated his state and federal due process rights by imposing certain fines and assessments pursuant to Government Code section 70373 and sections 1465.8 and 1202.4, subdivision (b) without first making findings as to his ability to pay them. The People argue Gonzalez forfeited this argument. We decline to decide these additional issues as we are already remanding the case for resentencing in light of the

¹ All further statutory references are to the Penal Code unless otherwise specified.

amendment to section 677, and Gonzalez can raise, should he choose to do so, his inability to pay argument during resentencing in the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

As the facts of this case were set forth in detail in our previous opinion, we do not repeat them here, except to the extent necessary to address the issues now before us. (See *People v. Lopez* (February 21, 2018, D072636) [nonpub. opn].)

A jury convicted Gonzalez of first-degree murder after he shot and killed another man with a firearm. At trial, he admitted that he had a previous felony juvenile adjudication for robbery with a firearm. Prior to sentencing Gonzalez for the murder, the trial court made a true finding that Gonzalez had incurred a prior serious felony conviction within the meaning of section 667, subdivision (a)(1) and a prior strike within the meaning of section 667, subdivisions (c) and (e)(1). Gonzalez argued the trial court should not consider the prior because it was a juvenile adjudication and not a conviction, but the court disagreed, and stated it was "compelled by law to apply [the] five-year enhancement" set forth in section 667, subdivision (a)(1). It also doubled the term from 25 years to life, to 50 years to life in accordance with section 667, subdivisions (c) and (e)(1).

At the conclusion of the sentencing hearing, the court addressed fines and assessments and, among others, imposed a \$30 conviction fee, a \$40 assessment security

fee, and a \$5,000 restitution fine pursuant to section 1202.4, subdivision (b).² Gonzalez did not object to the imposition of any of these fines or assessments and the trial court made no findings regarding his ability to pay them.

Gonzalez appealed, and this court remanded the matter to the trial court for resentencing in accordance with an amendment to section 12022.53, subdivision (h), which permits the trial court discretion to strike or dismiss a firearm enhancement in the interests of justice. (See *People v. Lopez* (February 21, 2018, D072636) at p. 38 [nonpub. opn].) On remand, the People argued the enhancement was warranted as the use of the firearm was an aggravating factor given the execution-style circumstances of the murder. The trial court agreed and denied Gonzalez's request to strike the firearm enhancement.

Gonzalez appeals again, raising additional sentencing issues.

DISCUSSION

I. *Remand for Resentencing is Appropriate to Allow the Trial Court to Consider Striking the Enhancement for the Prior Serious Felony Conviction Pursuant to Recently Amended Sections 667 and 1385*

The version of section 1385, subdivision (b) in effect when Gonzalez was originally sentenced in December 2015, stated, "[t]his section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." In 2018, the Legislature passed Senate Bill 1393, amending sections 1385 and 667. The amendment, which went into effect on January 1, 2019, after

² The trial court also imposed a second \$5,000 restitution fine but suspended it conditioned on Gonzalez's successful completion of the prison term pursuant to section 1202.45.

Gonzalez's resentencing, struck subdivision (b) from section 1385, thereby eliminating the prohibition on striking prior serious felonies, and made conforming changes to the language of section 667. (Stats. 2018, ch. 1013 (Sen. Bill 1393), §§ 1, 2, eff. Jan. 1, 2019.) Accordingly, the trial court now has discretion pursuant to sections 1385 and 667 to strike or dismiss an enhancement for a prior serious felony conviction. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*) [concluding Sen. Bill 1393 amends sections 1385 and 667 to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes].)

Gonzalez contends that because his case is not yet final, it should be remanded to the trial court once more to allow the court to consider whether to exercise its discretion to strike or dismiss the five-year enhancement for the prior serious felony conviction that the court imposed at sentencing pursuant to section 667. The People concede the case should be remanded for this purpose and take the position that an amendment to the law granting the trial court discretion to mitigate punishment, like the one at issue here, applies retroactively to cases that are not yet final in accordance with the reasoning set forth in *In re Estrada* (1965) 63 Cal.2d 740. (See also, *Garcia, supra*, 28 Cal.App.5th at p. 973 [finding the amendment applies retroactively]; *People v. Pride* (2019) 31 Cal.App.5th 133.) We agree. Moreover, here, the court expressly stated it was compelled by law to apply the five-year enhancement, and thus the record is clear the trial court believed it lacked discretion to strike the enhancement. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [remand is appropriate where the record indicates the trial court believed it lacked discretion].)

Accordingly, we again remand the case to the trial court for resentencing, with instructions for the trial court to consider whether to exercise its discretion to strike or dismiss Gonzalez's five-year enhancement for his prior serious felony conviction.

II. *On Remand, and in Light of Dueñas, the Trial Court May Also Consider Gonzalez's Ability to Pay Assessments Pursuant to Government Code Section 70373 and Section 1465.8 and/or the Restitution Fine Pursuant to Section 1202.4, Subdivision (b)*

On January 8, 2019, while the present appeal was pending, the Court of Appeal issued an opinion in *Dueñas, supra*, 30 Cal.App.5th 1157, in which it held that a trial court violated a defendant's right to due process under both the United States and California Constitutions by imposing court operations and facilities assessments pursuant to Government Code section 70373 and section 1465.8 without making a determination as to the defendant's ability to pay. (*Dueñas, supra*, at p. 1168.) Further, the court concluded that the imposition of restitution fines pursuant to section 1202.4, subdivision (b) raises similar constitutional concerns, and therefore held that, while the trial court must impose the minimum restitution fine even if the defendant demonstrates an inability to pay, it must stay execution of the fine in such cases until it determines the defendant has the ability to pay. (*Dueñas, supra*, at p. 1172.)

In supplemental briefing filed with the permission of this court and in reliance on the recent decision in *Dueñas, supra*, 30 Cal.App.5th 1157, Gonzalez asks us to either reverse the trial court's imposition of the court operations and facilities assessments imposed pursuant to Government Code section 70373 and section 1465.8 and the restitution fine imposed pursuant to section 1202.4, subdivision (b) or, in the alternative,

to remand the matter so that the trial court can consider evidence of his inability to pay the fine and assessments. The People contend the defendant bears the burden of proving an inability to pay particularly where, as here, the trial court imposes a restitution fine exceeding the statutory minimum, and that Gonzalez forfeited any argument regarding his ability to pay the fine and assessments by failing to raise it in the trial court. We need not and do not resolve these contentions. We are already remanding the matter for resentencing on another issue and, should he choose to do so, Gonzalez can raise an argument regarding his ability to pay the fine and assessments during resentencing.

DISPOSITION

The matter is remanded to the trial court for resentencing, with instructions for the court to consider, at a minimum, whether to strike the defendant's prior serious felony enhancement in accordance with the recent amendment to section 1385, subdivision (b).

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.